PIHP (Selangor) Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTIONS NO R2–25–31 OF 2001

FAIZA TAMBY CHIK J

31 JULY 2002

Administrative Law — Remedies — Certiorari — Application to quash part of decision of award by Industrial Court — Dispute on terms and conditions of employment in collective agreement — Whether Industrial Court had erred in law or acted in excess of its jurisdiction

Labour Law — Industrial Court — Award — Award in relation to terms and conditions of employment in collective agreement — Whether there was errors of law — Whether Industrial Court had erred in law or acted in excess of its jurisdiction

This was an application by the applicant under O 53 of the Rules of the High Court 1980 ('RHC') for an order of *certiorari* to quash part of the decision of the Industrial Court. The applicant was the owner of a hotel known as Petaling Jaya Hilton International ('PJ Hilton'), and the first respondent was a trade union ('the Union') representing employees within the scope of its representation and who were employed in the hotel. The present case arose out of a dispute on the terms and conditions of employment to be contained in the hotel's third collective agreement with the first respondent, whereby the case was referred to the Industrial Court as a trade dispute under s 26 of the Industrial Relations Act 1967 ('IRA 1967'). Upon the Industrial Court handing down the award on 21 February 2000, the applicant sought to quash part of the decision in the award relating to the salary structure, the salary adjustment, appendix A and the annual bonus. The applicant was also dissatisfied with the Industrial Court's award vis-à-vis the applicant's proposed introduction of a new job classification.

Held, dismissing the application:

(1) The 9.5% salary increase awarded by the Industrial Court was wholly consistent with industrial practice as evidenced by the collective agreements of other hotels, Shah's Village and the Shangri-La, which had provided for a 10% increase. PJ Hilton had never pleaded nor asserted financial inability to pay. In fact, its general manager had admitted that there was RM5,550,000 in fixed deposits at the end of 1999, as opposed to RM4,750,000 in 1998, and that PJ Hilton had made a gross operating profit of RM15,992,660 for 1999. The Industrial Court had quite correctly applied its mind to the fact that PJ Hilton had the ability to pay as a result of the evidence produced in court (see para 28).

(2) The onus was on PJ Hilton to introduce a proper scheme and to prove that it was in the hotel's and its employees' interests when introducing a productivity-linked bonus system to replace the current contractual bonus system that had prevailed in the first and second collective agreements, and also when introducing a new job integration scheme. However, PJ Hilton had failed to do so and totally failed to prove that it was 'a hotel in decline' (see para 28).

(3) Sufficient reasons were given by the Industrial Court for its decision in the award. Therefore, it was not now open to PJ Hilton to submit that the industrial Court had declined jurisdiction when PJ Hilton itself had failed to equip the Industrial Court with the evidence required to prove its case (see para 28).

(4) The collective agreement in question was to have commenced in January 1999 and should continue until 31 December 2001. The delay in implementing the same was detrimental to good industrial relations (see para 28). Further, even if there were errors, these were not errors of law and were minimal in nature. This court should exercise its discretion in allowing this collective agreement to proceed forward, which was wholly in accordance with the industry standards (see para 28).

(5) As such, taking into account the evidence, documents and submissions in delivering its award, the Industrial Court had neither erred in law nor acted in excess of its jurisdiction (see para 28).

[**Bahasa Malaysia summary**

Ini merupakan permohonan pemohon di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk suatu perintah *certiorari* bagi membatalkan sebahagian daripada keputusan Mahkamah Perusahaan. Pemohon adalah pemilik sebuah hotel dikenali sebagai Petaling Jaya Hilton International ('PJ Hilton'), dan responden pertama adalah satu persatuan pekerja ('persatuan pekerja') mewakili pekerja-pekerja di dalam skop perwakilannya dan telah diambil bekerja di hotel itu. Kes ini timbul daripada pertikaian berkenaan dengan terma-terma dan syarat-syarat pekerjaan yang sepatutnya dimasukkan di dalam perjanjian kolektif yang ketiga hotel itu dengan responden pertama, di mana kes ini telah dirujukkan kepada Mahkamah Perusahaan sebagai pertikaian dagangan di bawah s 26 Akta Perhubungan Perusahaan 1967 ('Akta 1967'). Apabila Mahkamah Persekutuan memberikan award pada 21 Februari 2000, pemohon telah memohon untuk membatalkan sebahagian keputusan didalam award itu berkenaan dengan struktur gaji, penyelarasan gaji, apendiks A dan bonus tahunan. Pemohon juga tidak puas hati terhadap award Mahkamah Perusahaan berkenaan cadangan pemohon untuk memperkenalkan suatu klasifikasi kerja yang baru.

Diputuskan, menolak permohonan:

(1) Peningkatan 9.5% gaji yang diawardkan oleh Mahkamah Perusahaan adalah konsisten secara keseluruhannya dengan amalan industri sebagaimana yang dibuktikan oleh perjanjian-perjanjian kolektif hotel lain, Shah's Village dan Shangri-La yang telah memberi 10% kenaikan. PJ Hilton tidak pernah memplidkan atau menyatakan ketidakupayaan kewangan untuk membayar. Malahan, pengurus besarnya telah mengaku terdapat RM5,550,000 didalam simpanan tetap pada akhir tahun 1999, berbanding RM4,750,000 pada tahun 1998, dan PJ Hilton telah memperoleh keuntungan kasar operasi sebanyak RM15,992,660 untuk tahun 1999. Mahkamah Perusahaan telah mempertimbangkan fikirannya secara betul kepada fakta bahawa PJ Hilton berupaya untuk membayar berdasarkan daripada keterangan yang dikemukakan di mahkamah (lihat perenggan 28).

(2) Beban adalah ke atas PJ Hilton untuk memperkenalkan skim yang sesuai dan membuktikan bahawa ia adalah untuk kepentingan hotel dan pekerja-pekerjanya untuk memperkenalkan suatu sistem bonus yang berkaitan rapat dengan produktiviti untuk menggantikan sistem bonus kontrak yang sedia ada yang telah diperuntukkan di dalam perjanjian-perjanjian kolektif, dan juga semasa memperkenalkan skim integrasi kerja yang baru. Walau bagaimanapun, PJ Hilton telah gagal untuk berbuat sedemikian dan gagal sepenuhnya untuk membukti bahawa ia adalah 'a hotel in decline' (lihat perenggan 28).

(3) Alasan-alasan yang mencukupi telah diberikan oleh Mahkamah Perusahaan atas keputusannya di dalam award itu. Oleh itu, tidak lagi terbuka kepada PJ Hilton untuk mengemukakan bahawa Mahkamah Perusahaan telah menolak bidang kuasa apabila PJ Hilton sendiri gagal untuk mengemukakan kepada Mahkamah Perusahaan keterangan yang diperlukan untuk membuktikan kesnya (lihat perenggan 28).

(4) Perjanjian kolektif yang dipersoalkan ini sepatutnya bermula pada Januari 1999 dan berterusan sehingga Disember 2001. Kelewatan untuk melaksanakannya adalah merugikan kepada perhubungan industri yang baik (lihat perenggan 28). Seterusnya, walaupun terdapatnya kesilapan-kesilapan, ianya bukan merupakan kesilapan-kesilapan undang-undang dan adalah minimum pada sifatnya. Mahkamah ini sepatutnya menggunakan budi bicaranya membenarkan perjanjian kolektif ini untuk diteruskan, yang bertepatan sepenuhnya dengan standard industri (lihat perenggan 28).

(5) Oleh itu, dengan mengambil kira keterangan, dokumen-dokumen dan hujah-hujah semasa memberikan awardnya, Mahkamah Perusahaan tidak membuat satu kesalahan di segi undang-undang ataupun tidak bertindak melampaui bidang kuasanya (lihat perenggan 28).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 165– 173.
For cases on Industrial Court's awards, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.
For certiorari generally, see 9 *Halsbury's Laws of Malaysia* paras [160.117]–[160.129].

Cases referred to

B Braun Medical Industries Sdn Bhd Pulau Pinang v Kesatuan Pekerja-Pekerja B Braun Industries Sdn Bhd, Pulau Pinang [1998] 3 ILR 154 (refd)
Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97 (refd)
Desaru View Hotel, Kejora Avi Sdn Bhd Johor v National Union of Hotel, Bar & Restaurant Workers [1991] 1 ILR 82 (refd)
Felda Oil Products Sdn Bhd v Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [1998] 3 ILR 374 (refd)
Goh Keah Hock v Mahkamah Perusahaan, Malaysia & Anor [2002] 5 MLJ 37 (refd)
Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd [1996] 3 MLJ 464 (refd)
Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v DMIB Bhd [1998] 1 MLJ 279 (refd)
Koko (M) Sdn Bhd v Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan [2002] 1 MLJ 262 (dist)
Kuantan Beach Hotel Sdn Bhd – Hyatt Kuantan v National Union of Hotel Bar & Restaurant Workers [1998] 2 ILR 29 (refd)
Malayan Banking Bhd v Association of Bank Officers [1984] ILR 537 (refd)
Plywood Manufacturing Co Sdn Bhd v Timber Employees Union [1986] ILR 457 (refd)
Sarawak Commercial Banks Association v Sarawak Bank Employees' Union [1989] 1 ILR 349 (refd)
Shivaraj Fine Arts Litho Works v State Industrial Court, Nagpur [1978] LAB IC 828 (foll)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)
Syarikat Telekom Malaysia Bhd v Kesatuan Pekerja-Pekerja Syarikat Telekom Malaysia Bhd [1991] 1 ILR 512 (refd)
Toweltech Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Seberang Prai [2000] 1 ILR 591 (refd)
Tractors Auto Components lwn Kesatuan Pekerja-Pekerja Perusahaan Alat-alat Pengangkutan dan Sekutu [2000] 1 ILR 723 (refd)
Trengganu Bus Co Sdn Bhd v Transport Workers Union [1983] 1 MLJ 393 (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 13(3), 26, 29, 30(4), (5)
Rules of the High Court 1980 O 53 r 3(2)

N Sivabalah (Raymond Low with him) (Shearn Delamore) for the applicant.
Ambiza Sreenevasan (Alan Gomez with him) (Tommy Thomas) for the respondents.

Faiza Tamby Chik J:

[1] This is an application by the applicant, PIHP (Selangor) Berhad (Petaling Jaya Hilton International) (PJ Hilton) under O 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash part of the decision of the Industrial Court in Award 106/2001. The background of the case is as follows. The applicant is the owner of a hotel known as the Petaling Jaya Hilton International (hereinafter referred to as 'the hotel'). The first respondent is a trade union of employees (hereinafter referred to as 'the Union') which represents employees within the scope of its representation and who are employed in the hotel. The present case arose out of a dispute on the terms and conditions of employment to be contained in the hotel's third collective agreement with the first respondent. Sometime in 1999, both the hotel and the second respondent commenced negotiations on the terms and conditions of employment to be concluded in the third collective agreement. The collective bargaining process reached a deadlock, which resulted in a joint reference of the dispute to the Industrial Relations Department. The machinery of conciliation at the said department was exhausted but no settlement was reached. The matter was then referred to the Industrial Court as a trade dispute under s 26 of the Act. On the date of hearing, the parties informed the Industrial Court that there were only seven disputed articles, which required adjudication by the court. The court then proceeded to hear the matter. Both parties tendered several documents to support their respective proposals. The hotel called upon its general manager to testify to support its proposal. On 21 February 2000, the Industrial Court handed down its award on the disputed articles. In the statement pursuant to O 53 r 3(2) (encl 2), the applicant seeks to quash part of the award in respect of the following articles:

> Article 10 — Salary Structure, Salary Adjustment and Appendix A; and
>
> Article 11 — Annual Bonus

[2] The applicant is also dissatisfied with the Industrial Court's award on PIHP (Selangor) Berhad's proposed introduction of a new job classification.

[3] I am of the opinion that there is no doubt that an inferior tribunal has no jurisdiction to commit an error of law (see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317). Also in exercising its judicial review functions, the High Court cannot disturb findings of fact (see the case of *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600), per Gopal Sri Ram JCA at p 613:

> If a judge to whom application is made for *certiorari* inquiries into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings

the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses.

[4] See also *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97 and this court's judgment in *Goh Keah Hock v Mahkamah Perusahaan, Malaysia & Anor* [2002] 5 MLJ 37. It must be noted that a collective agreement is not a commercial document. 'A reasonable and pragmatic approach, shorn of an excess of legal learning, is therefore called for when construing a collective agreement' (per Gopal Sri Ram, JCA in the case of *Kesatuan Pekerja-Pekerja Perkayuan v Syarikat Jengka Sdn Bhd* [1996] 3 MLJ 464 at p 475). *Certiorari* is a discretionary remedy and may be refused not only on the merits but also in the special circumstances of the case (*Trengganu Bus Co Sdn Bhd v Transport Workers Union* [1983] 1 MLJ 825 at 396).

[5] PJ Hilton has argued that the Union, in not calling any witnesses had failed to rebut PJ Hilton's witnesses' testimony. Therefore, the testimony remained unchallenged. PJ Hilton relied on the case of *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v DMIB Bhd* [1998] 1 MLJ 58 279. I am of the opinion that the only way to challenge the evidence of a witness is to call a witness to rebut it. In the instant case, it is observed that PJ Hilton's witness's statement was rebutted by way of the cross-examination conducted by the Union. The purpose of cross-examination is as stated in *Sarkar's Law of Evidence* on p 112 is as follows:

> the object of cross examination is two-fold — to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses (Phip 11th Ed p 648). The objects are to impeach the accuracy, credibility, and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party (Powell, 9th Ed p 532). The exercise of this right is justly regarded as one of the most efficacious tests, which the law has devised for the discovery of truth.

[6] Therefore, I think the Union has sufficiently rebutted the hotel's case in cross-examination. In any event the hotel's evidence was wanting in several respects and the major changes to the collective agreement that they proposed was never justified by PJ Hilton through their witness. In fact the Industrial Court was very critical of the quality of the evidence proffered by PJ Hilton's representative and found it in some instances to be superficial. These findings should not be disturbed (see *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600). I think the Union was in no position to produce a witness to rebut PJ Hilton's contentions on the affairs of PJ Hilton. These issues are entirely within the purview and knowledge of PJ Hilton and/or its representative. The procedure in the Industrial Court in relation to collective agreements is informal and often witnesses are never called by either party who will rely on documents submitted to the court and oral submissions. The Industrial Court is empowered pursuant to the Industrial Relations Act 1967 to hear and make an award on

the matter before it on such evidence, documents and submissions that are presented (see ss 29 and 30(5) of the Industrial Relations Act 1967). It is noted that the Union produced documentary evidence by way of submission of the same to the court. It is seen that this procedure was not challenged by PJ Hilton. The documents produced served to rebut the contentions put forward by PJHilton. And also PJ Hilton's own documentary evidence does not support PJ Hilton's case of it being 'a hotel in decline'. PJ Hilton as the applicant, has made much of this issue in its written submissions in reply. It is significant to note that by convention and practice, proceedings on collective agreements in the Industrial Court are fairly informal. There is one cardinal rule however, that is, the party that proposes a change, must prove his case. It is important to note that in this case the changes that were proposed by PJ Hilton were fundamental. A party cannot come to the Industrial Court seeking to persuade the court with vague figures and justification. Particularly, on the facts of this case, where on issues such as job integration and in proposing to change a whole system, PJ Hilton must know what they are talking about when proposing such change. There are many anomalies in PJ Hilton's proposal and that they were wholly lacking in supporting evidence. PJ Hilton did not even get to first base as they had failed to prove their case even before cross-examination. PJHilton's proposals certainly fell apart even more after cross-examination prompting the Industrial Court to be critical of the quality of the evidence proffered by PJ Hilton's representative and finding it, in some instances, to be superficial.

[7] It is observed that the Union has at all material times during the proceedings before the Industrial Court adduced and relied on evidence of the terms and conditions of Shah's Village Hotel ('Shah's') as a comparison to PJ Hilton. Shah's is a three star hotel located within the vicinity of PJ Hilton and is therefore relevant for the purposes of comparison. This is evident from the Union's bundle of documents and written submissions exhibited at exh MZP5 and MZP6 respectively of Mohamed's affidavit. The case for the Union is that Shah's, a three star hotel, charges a lower room rate than PJ Hilton which is a five star hotel and despite this their terms and conditions are better than the PJ Hilton's, the applicant. Shah's 6th collective agreement (1 May 1997–30 April 2000) is at p 325 of the affidavit of Mohd Zain bin Puteh. The comparison of the two proposals is to be found at p 303. The salary structure and adjustment of Shah's is to be found at art 20 of then collective agreement which is 10% or RM40 which is greater. The Union's proposal herein in respect of PJ Hilton was 10%, and thus wholly in accordance with industry rates. I think the Consumer Price Index (CPI), is merely a guide to determining the salary structure. In *Felda Oil Products Sdn Bhd v Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [1998] 3 ILR 374 at 377, the court held:

> The court views and will agree that a 15% across the board increase will be on the high side considering the factors submitted by the company counsel, that

generally the downturn in the country's economy has affected the company's operations to a certain extent. On the other hand, although the profit margins have gradually decreased over the years, the company was still in a position to make some margin of profits, notwithstanding the difficult time...

So, some measure of increase would be justified considering the overall performance of the company.

The court feels that to be merely guided by the CPI of 9% is not a fair proposition and not equitable. Using CPI as merely guideline, in this case the court will award 12% looking at the comparable industries as well.

[8] This was further confirmed in *Sarawak Commercial Banks Association v Sarawak Bank Employees' Union* [1989] 1 ILR 349, where the court held at p 352:

7 Rule of 60% or 2/3 of CPI increase

The general principles of wage fixation are well established in industrial law. They are found in many Industrial Court awards. They are:

(1) Wages and salaries prevailing in comparable establishments in the same region;

(2) Any rise in the cost of living since the existing salaries were last revised;

(3) The financial capacity of the employer to pay the increase; and

(4) The legitimate desire of the employer to make a reasonable profit.

[9] The Association submitted that the Industrial Court had failed to give due regard to one of the principles of wage fixation, ie, any rise in the cost of living since the existing wages were last revised, in that the court had awarded in Award No 9/89 a 4% pay increase when the pay increase in the CPI was, according to its computation, only 3.77%. We had discussed the increase in the CPI in para 5 above and arrived at a conclusion that the increase was 4.7% and we have given our reasons for arriving at such a conclusion. But the Association felt that the increase of 4% in Award No 9/89 was excessive and contrary to one of the principles of wage fixation, as in para 7(2) above. It said that the court had infringed against 'the 60% or 2/3 rule' laid down in Award No 117/82. The general principles, when considering any rise in the cost of living, are, as Harun J (as he then was) said in Award No 117/82 'not to match the full extent of the increase in the CPI'. And Harun J's '60% or 2/3 rule' is but a guide to us. And so when the court in our view, offended the 'CPI principle' relating to wage fixation as it is still within the bounds of the CPI increase.

[10] The 9.5% salary increase awarded by the Industrial Court is wholly consistent with industrial practice as evidenced by Shangri La's and Shah's collective agreements which have provided for a 10% increase. PJ Hilton has referred the decision in *Koko (M) Sdn Bhd v Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan* [2002] 1 MLJ 262. I am of the view however that this authority is clearly distinguishable on its facts as the applicant company therein had right from the outset raised the plea of financial incapacity. Evidence was

also tendered of the applicant company's financial losses, which evidence was not disputed. PJ Hilton has never pleaded nor asserted financial inability to pay. In fact, COW1, Encik Mohd Zain Puteh, the General Manager of PJ Hilton had admitted under cross-examination that there was RM5,550,000 in fixed deposits at the end of 1999, as opposed to 1998, when there was a fixed deposit of only RM4,750,000 and that PJ Hilton has made a Gross Operating Profit of RM15,992,660 for 1999. The Industrial Court had quite correctly applied its mind to the fact that PJ Hilton had the ability to pay as a result of the evidence produced in court.

[11] The relevant period for the calculation of the CPI increase is the actual period covered by the previous collective agreement. In *Malayan Banking Bhd v Association of Bank Officers* [1984] ILR 537, Harun J (as he then was) stated at p 540:

> To avoid further disputes of this nature, we think what we should be looking back to is the actual period covered by the previous collective agreement or award. For the purpose of this exercise therefore we looked at CP1 from February 1980 to December 1983.

[12] This is further confirmed by PJ Hilton's authority relied on at p 8 of their submissions namely the authority of *Tractors Auto Components lwn Kesatuan Pekerja-Pekerja Perusahaan Alat-alat Pengangkutan dan Sekutu* [2000] 1 ILR 723, that the relevant period for the calculation of CPI is the actual period covered by the previous collective agreement.

[13] The present dispute relates to the third collective agreement. The actual period covered by the second collective agreement for PJ Hilton is from 1January 1996 until the commencement date of the third collective agreement. If the effective date (ie, commencement date) of the third collective agreement is 1 October 1999, as found by the Industrial Court and I observe is not challenged by PJ Hilton, then the actual period for the calculation of the CPI will be from 1 January 1996 to 30 September 1999 which is the actual period of the 2nd collective agreement. The CPI increment for that relevant period is 14.2%:

120.0 (as at September 1999)
_ 105.8 (as at January 1996)
14.2

and 2/3 of 14.2% is 9.47%. The calculation and basis for the CPI is to be found at pp 323 and 324 of Mohamed's affidavit. PJ Hilton's calculation at p 8 of their submissions is erroneous as it assumes the commencement date of the 3rd collective agreement to be September 1996 and the period taken into account for the increment of the CPI from September 1996 to September 1999. In the circumstances, the 9.5% awarded by the Industrial Court is wholly reasonable. In any event the CPI is merely a guideline and given the salary adjustments in the hotel industry as evidenced by Shah's and Shangri-la's

collective agreements, 9.5% is wholly reasonable. Shangri-la's collective agreement is to be found at p 136 of the respondent's bundle of authorities. The Industrial Court had, after hearing all the oral evidence and reviewing the evidence submitted including the proposals and calculations by the parties, awarded 9.5% on the basis of the salary as at 1 October 1999 rounded up to the nearest higher Ringgit from the period 1 October 1999 to 30 September 2002 (see p 4 of the award).

[14] It is observed that the hotel has never pleaded nor asserted financial inability to pay. In fact COW1, En Mohd Zain Puteh, the General Manager of PJ Hilton has testified in his evidence on the value of service charge that 'in general, it is higher than any other five star hotels'. If the service charge is high in value, correspondingly the revenue is also higher. COW1 has also admitted under cross-examination that there is RM5,500,000 in fixed deposits at the end of 1999, as opposed to 1998, when there was a fixed deposit of only RM4,750,000. COW1 further admitted that PJ Hilton has made a Gross Operating Profit of RM15,992,660 for 1999. I think PJ Hilton cannot be allowed to make deductions for provisions, management fees and amortization (depreciation) of RM5,997,669. In other words the Gross Operating Profit of RM15,992,660 stands intact. In the Supreme Court case of *Shivaraj Fine Arts Litho Works v State Industrial Court*, Nagpur reported in [1978] LAB IC 828, PS Kailasam J held:

> Summing up the position the Court held that the above decision *(Gramophone Company Ltd v Its Workmen)* categorically rules out any deduction of taxation. It also excludes from deduction all provision for reserves which will take in depreciation reserve also. The decision makes it clear that provisions for taxation and reserve cannot take precedence over gratuity and fixation of wages. The provision for income tax, reserve and depreciation are not permitted. The High Court was therefore right in its view that no rebate can be allowed towards payment of income tax.

[15] At p 839 Kailasan J has affirmed as follows:

> This Court clearly laid down that no deduction should be allowed for payment of income tax or allowances made for depreciation or for making provision for reserves.

[16] These local cases of *Toweltech Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Seberang Prai* [2000] 1 ILR 591 and *Kuantan Beach Hotel Sdn Bhd – Hyatt Kuantan v National Union of Hotel Bar & Restaurant Workers* [1998] 2 ILR 29 affirm his proposition. The Industrial Court had quite correctly applied its mind to the fact that PJ Hilton had the ability to pay as a result of the evidence produced in court. This is quite contrary to the assertion of PJ Hilton that there was no consideration of the financial position of the hotel by the Industrial Court.

[17] I think even if the Industrial Court had not specifically mentioned s 30(4) there is no doubt that the court had considered the financial implications of the award. In any event it is unclear from PJ Hilton's submissions what they say are the implications to the industry that should have been taken into account by the court but were not. As far as the industry is concerned, it is significant to note that Shah's collective agreement shows a 10% increase as does Shangri-la's collective agreement which was for 1997 – 31 December 1999 which was at the height of the recession as admitted by PJ Hilton's witness who admits that the economic crisis was for the period 1997 – 1998 (see p 14 of the appellant's submissions). Therefore there is nothing unusual in the award of 9.5%. As far as the industry is concerned, PJ Hilton has failed to show that this award is out of step with the hotel industry. As such, I am of the opinion that all assertions of reduction of room rates, decline in turnover, and operational profits is hardly evidence of PJ Hilton being 'a hotel in decline'. The accounts referred to earlier including sums paid to directors points to anything but a hotel in decline. A review of the award clearly discloses that the court had given reasons for salary structure and salary adjustment at pp 3 and 4 of the award; for job integration at pp 3 and 4 of the award; for annual increment at p 9 of the award; and for annual bonus at p 10 of the award. On salary structure the Industrial Court was clearly guided by Shah's collective agreement (see p 9 of the award). On the issue of annual bonus, PJ Hilton proposed the introduction of a productivity linked bonus system to replace the current contractual bonus that has prevailed in the 1st and 2nd collective agreements. The law on the introduction of a productivity linked bonus system is twofold:

(i) Once bonus is made contractual, the courts are slow to make it non-contractual

[18] Mohamed by his own testimony, has admitted that the rates of bonus which the Union proposed to maintain from the second collective agreement between PJ Hilton and the Union has been contractual for the last 10 years. Mohamed had by his testimony said that the rates of bonus as contained in the second collective agreement was not discretionary and admitted that PJHilton's proposal on the rates of bonus to be discretionary, would in effect change its character. Since bonus had been made contractual, it has become one of the terms of employment and it should not be altered to the prejudice of the employees. It is well established in industrial law that once bonus is made contractual, the courts are slow to make it non-contractual.

[19] In *Plywood Manufacturing Co Sdn Bhd v Timber Employees Union* [1986] ILR 457, where the court held at p 458:

> 3 Annual Bonus
>
> Under the first and second agreements, the employees were given an annual bonus based on 24 days wages/salary each. It was a contractual bonus. But now the Company asked us to make it discretionary on the ground that the Company was not in a sound financial position to pay. The Union however, contended that

since bonus had been made contractual, it had become one of the terms of employment and it should not be altered to the prejudice of the employees. We agree with the Union that, in the instant case, payment of annual bonus has become a part of the contract of employment and that it should not be changed to the prejudice of the employees unless there are very extraordinary circumstances warranting such a change.

[20] In *Desaru View Hotel, Kejora Avi Sdn Bhd Johor v National Union of Hotel, Bar & Restaurant Workers* [1991] 1 ILR 82, where the court held at p 86:

Annual Bonus

Under the 1985 Agreement, employees within the scope of the Award received one month's last drawn basic salary as bonus. Now the union proposed to retain the contractual bonus of one month's last drawn basic salary. But it asked for an additional $40. The hotel, however, proposed that the bonus be paid to the employees 'Subject to hotel's performance'. It is well established in industrial law that once bonus is made contractual, the court will not make it non-contractual and *vice-versa* — see *Shangri-la Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* (Award No 303/88).

(ii) The onus lies on PJ Hilton to justify change

[21] In the case of *B Braun Medical Industries Sdn Bhd Pulau Pinang v Kesatuan Pekerja-Pekerja B Braun Industries Sdn Bhd, Pulau Pinang* [1998] 3 ILR 154, the court had occasion to consider the introduction of a productivity linked bonus system and held:

Some quarters thought it is for the Industrial Court to impose upon employers and employees that their collective agreement and in particular the provision relating to salary and benefits must be based on the principle that increase in salaries and other benefits must only be granted following increase in productivity. The court cannot do so. It will only make a decision on a matter or matters that are brought before it. If the parties have negotiated salary revision on the principle that there should be salary increase following an increase in the cost of living as reflected by the consumer price index (CPI) and failed to reach agreement on the rate of the increase the court will examine the parties' proposals, the evidence and submission and make an award based on the principle and the court can only decide on the percentage increase to be awarded if there is justification for an improvement. It cannot reject the employees proposal for salary increase because it is not linked to productivity. It is for the company to propose a scheme that is based on productivity. The B. Braun's scheme is one example of what the court considers a fair and suitable method of rewarding increased productivity. There is scarcity of information on the concept of productivity, the standards to be used and the rewards to be given for increase in productivity and the measurement of productivity. Therefore the B award as annexure 1 for the benefit of those who would like to know more of the system.

[22] Clearly in the *B Braun* case a detailed and satisfactory proposal was put forward which was accepted by the court. The proposal is at pp 156–161 of

the authority. On the other hand PJ Hilton's proposal (at p 40 of PJ Hilton's written submissions) was not satisfactory to the Industrial Court. Under cross-examination, PJ Hilton's sole witness was unable to justify the figures their calculations were based on:

Lim: Now back to CO3, page 10. The proposal before this Court now is discretionary and based on productivity.

MZ: Yes, Yang Arif.

Lim: In other words, you have changed the character of bonus.

MZ: Yes Sir.

Lim: You have put 60 million for Year 2, 62 million for Year 3. How did you get these figures?

MZ: These are figures, projections forecast based on historical achievements of this year and last year (1999 and 2000).

Lim: Who decide on these figures?

MZ: There are three (3) parties:

(1) The hotel Financial Marketing Team;

(2) Our Regional Office in Singapore (Hilton International Regional Office);

(3) The owning company, PHIP.

Lim: How did they arrive at this figure? I want to ask you: you pay 25% to PHIP? Pernas is not involved in the operations, why involved in the 62 million?

MZ: 75% of the profits go to them.

Lim: 62 milion is not realistic if there is a currency attack?

Lim: I put it to you that if there is a currency attack, these figures are no longer realistic.

Court: You disagree is it?

MZ: I disagree.

Lim: Who fixed the 100%?

MZ: The team of three (3).

Lim: Would you be able to tell the Court why you start with 100%/ Why not 90% or 95%?

MZ: No.

Lim: So 100% is an arbitrary figure?

MZ: No Bonus is based on productivity.

Lim: But in the hotel industry, productivity comes in many forms.

The Industrial Court's finding was as follows: **A**

> Under the circumstances, the Hotel's proposal is to pass on a part of the business risk to the workers through the variation of the entitlement of annual bonus.

The Panel finds this inequitable.

[23] It is observed that it is insufficient for PJ Hilton to produce a witness **B** who gives vague answers to issues relating to the change. Even without cross-examination, PJ Hilton's evidence was wholly insufficient to justify change. Therefore the cases cited by PJ Hilton as regards unrebutted evidence is irrelevant. In any event the Industrial Court took into account the most relevant consideration for PJ Hilton's proposal namely that they totally failed to justify **C** the change proposed.

[24] It is observed that Mohamed Zain bin Puteh's testimony on PJ Hilton's proposed job integration was challenged by the Union in cross-examination and submitted upon extensively by the Union in its Written Submissions dated 19 December 2000 (a copy of which is exhibited at pp 433 to 433 of exh MZP6 **D** in Mohamed's affidavit). In summary, the Union's case on job integration is as follows:

(a) There was no consultation with the Union before PJ Hilton put up their proposals. Therefore it was done in haste and not well considered;

(b) No professionals were called in for this complicated exercise **E** (compare the case of *Syarikat Telekom Malaysia Bhd v Kesatuan Pekerja-Pekerja Syarikat Telekom Malaysia Bhd* [1991] 1 ILR 512 at 520, where Hay Management Consultants were appointed to review the terms and conditions of service and salary schemes);

(c) The mechanics of the system were not thought through and the **F** following anomalies would arise (see the cross-examination of COW at pp 11 to 15 of the Notes of Evidence):

(1) The promotion of Senior Waiter/Waitress under B1 to B2 in U2 is practically nil and their increments would be greatly reduced as opposed to under the second collective agreement; **G**

(2) The junior bartender is also integrated into F&B Service Assistance and the reason given for this was 'new technology' but this fails to take into account the skills of a bartender required in dispensing cocktails or mixed drinks;

(3) The integration of Bellman/Doorman and Car Jockey into **H** Front Office Service Assistant is flawed as not all can do the work of a car jockey particularly when a car jockey is made responsible for any damage to the car;

(4) The integrated job of Housekeeping Service Assistant which merges Housekeeping Attendant, Room Attendant, Linen **I** Attendant and Gardener is again flawed in view of the difference in skills that are required;

(5) The job integration also causes disparity in the distribution of service charge as was admitted by PJ Hilton's witness;

(6) Service charge is a sensitive issue and should not be disturbed arbitrarily (see *Syarikat Telekom Malaysia Bhd v Kesatuan Pekerja-Pekerja Syarikat Telekom Malaysia* [1999] 1 ILR 512 at 523).

[25] In the circumstances the court was correct in concluding that the evidence of PJ Hilton was far from satisfactory when dealing with the issue of job integration, a highly sensitive and complicated structure that must be examined carefully. The Industrial Court found as follows:

> The Hotel has also proposed a new job classification in Appendix A on grounds of maintaining competitive edge and to improve productivity. Witness for the Hotel Encik Mohamed Zain bin Puteh, the General Manager of the Hotel gave evidence on the hotel's proposal based on CO1. He answered questions posed by counsel for the Hotel in an attempt to explain the Hotel's proposal. The panel observes that the Hotel had failed to explain in detail the basis for their proposed new job classification and its implications in terms of improvements in productivity and the sharing of gain in productivity with the workers. Reorganisation of duties amongst designations alone is insufficient. Productivity should focus on 'working smart' rather than 'working hard'. Reorganisation of work is not an absolute prerogative of the employer. Due consideration must be given to evaluation of the anticipated consequences of proposed changes to organization and methods of work so that workers do not become worse off in their terms and conditions of employment. His evidence was superficial statements in response to counsel's questions. The Panel is unable to make an award for change based on the proposal of the Hotel especially when there is no objective and extensive study with in depth analysis on the consequences of organization methods of work with focus on the economic implications on labour and management (at p 3 of the Award).

[26] The Industrial Court's award clearly took into consideration the oral testimony of Mohamed Zain bin Puteh, but found it to be superficial and lacking in substance in relation to the basis for the proposed new job classification. This was a reasonable conclusion to be drawn by the Industrial Court as can be seen from the vague answers given under cross-examination at pp 11 to 15 of the Notes of Evidence.

[27] PJ Hilton has also submitted that the reassignment and reallocation of jobs are the prerogative of management by virtue of s 13(3) of the Industrial Relations Act 1967. I think this section does not confer such a prerogative on management. The Industrial Court was also not impressed with this argument as can be seen by their comment 'Reorganisation of work is not an absolute prerogative of the employer. Due consideration must be given to evaluation of the anticipated consequences of proposed changes to organisation and methods of work so that workers do not become worse off in their terms and conditions of employment'.

[28] In summary, I have come to the following conclusion:

(a) The Industrial Court had taken all relevant factors into consideration, based upon the documents, evidence and submissions before it, in awarding a 9.5% increase in Salary Adjustments and allowing the Union's proposal to the Salary Structure;

(b) The law places the onus on PJ Hilton to introduce a proper scheme and prove that it is in the hotel's and its employees' interests when introducing a productivity linked bonus system to replace the current contractual bonus that has prevailed in the first and second collective agreements and also when introducing a new job integration scheme. PJ Hilton had failed to do so;

(c) In all the circumstances of this case, PJ Hilton has totally failed to prove that they are 'a hotel in decline';

(d) Sufficient reasons were given by the Industrial Court in their award;

(e) It is not now open to PJ Hilton to submit that the Industrial Court had declined jurisdiction when PJ Hilton themselves had failed to equip the Industrial Court with the evidence required which would prove their case;

(f) *Certiorari* being discretionary this court should reject this application on the following further grounds:

(i) the collective agreement in question was to have commenced in January 1999 and should continue until 31 December 2001. The delay in implementing the same is detrimental to good industrial relations;

(ii) even if there are errors, these are not errors of law and are minimal and this court should exercise its discretion in allowing this collective agreement, which is wholly in accordance with the industry standards, to proceed forward.

[29] Therefore taken into account the evidence, documents and submissions in delivering its award, the Industrial Court had neither erred in law nor acted in excess of its jurisdiction. Accordingly I conclude that PJ Hilton's application is hereby dismissed with costs.

Appeal dismissed with costs.

Reported by Mohd Nizam Hamdan